

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY CARL WASHINGTON,

Defendant-Appellant.

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UNPUBLISHED

June 13, 2006

No. 260155

Wayne Circuit Court

LC No. 04-004270-01

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant Gregory Washington appeals as of right his jury convictions of second-degree murder,<sup>1</sup> two counts of assault with intent to commit murder,<sup>2</sup> felon in possession of a firearm,<sup>3</sup> and possession of a firearm during the commission of a felony,<sup>4</sup> and his sentence, as an habitual offender, second offense,<sup>5</sup> to concurrent terms of 40 to 60 years' imprisonment for the second-degree murder conviction, life imprisonment for each assault conviction, and 2 to 7-1/2 years' imprisonment for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm Washington's convictions but remand for resentencing.

I. Basic Facts And Procedural History

Washington's convictions arise from evidence that he fatally shot John Scott, the owner of a house being rehabilitated as rental property, and shot at Ronald Franks and John Lilly, two employees of the Detroit Water and Sewage Department, while Franks and Lilly were attempting to install a water meter at Scott's house on September 29, 2003. Washington presented an

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<sup>1</sup> MCL 750.317.

<sup>2</sup> MCL 750.83.

<sup>3</sup> MCL 750.224f.

<sup>4</sup> MCL 750.227b.

<sup>5</sup> MCL 769.10.

insanity defense at trial. The prosecutor's theory was that Washington's drug use affected his perception of the facts before him, but that he was not insane.

Washington lived next door to the house Scott was rehabilitating for use as rental property. On September 29, 2003, Franks and Lilly went to Scott's house to install a water meter. Lilly remained outside, while Franks and Scott went into the basement. While Lilly was carrying equipment to the side of Scott's house, he overheard the sound of a window opening at the neighboring house. When Lilly looked up to identify where the noise was coming from, he heard someone say, "what are you doing out there." Lilly then heard the sound of a window breaking and saw the barrel of a pistol come out the broken window. He raised a hand and identified himself, while backing up toward the utility truck. He dove behind the utility truck after hearing a gunshot and then crawled to a vacant lot and ran away. Franks heard four gunshots while in the basement and heard additional gunshots after he, accompanied by Scott, exited a side door of the house and proceeded toward the front of the house to check on Lilly. Scott made a grunting noise. Franks went back into the house and contacted his foreman on a walkie-talkie to report what was happening. He had a partial view of a man between Scott's house and the neighboring house. The man said, "I got one. And I can hear the one inside talking on his walkie talkie." Franks later located Scott on the basement floor with blood coming from his mouth.

Glenn Robinson, who lived across the street from Washington, heard a commotion outside, which consisted of yelling and possibly gunshots, and looked out a window at Washington's house where he saw Washington on the roof overhanging the front porch of his house. Robinson asked Washington what he was doing, and Washington replied, "help me, please help me" and that "somebody was trying to kill him." Washington also said that he thought that his house was going to be blown up. The police arrived shortly thereafter.

Detroit Police Officer Samuel Choice saw Washington at an upstairs window of the house and spoke with him in an effort to have him surrender. During Officer Choice's conversation, Officer James Dains heard Washington say something like, "the water department was going to blow up his home, and he didn't know what to do." Officer Choice smelled a marijuana odor coming from Washington's house. Washington told Officer Choice that he shot someone and would come out if the police "get the person from the side of his house." Officer Choice also overheard Washington speak to someone on the telephone, saying "what should I do" and "this is messed up." The scene was secured by other police officers and a special response team consisting of about 19 officers arrived, but concealed themselves around the house. Washington did not surrender, but rather jumped out the back window of the house. He ran back toward the house after Sergeant Kevin Shephard announced his presence. Other police officers approached and arrested Washington. After Washington was arrested, a search was conducted of his house during which the police found marijuana, suspected cocaine, an assault rifle, and a Glock nine-millimeter handgun. A firearms expert opined that a bullet retrieved from Scott's body was fired from the handgun. The parties stipulated that Washington could not lawfully possess a firearm because he had a previous felony conviction.

The defense called Washington's sister Danita Thomas, his friend John Baldwin, and two experts, Cathie Zmachinski, a forensic psychologist specializing in clinical psychology, and Eric Amberg, a clinical psychologist specializing in neuropsychology, in support of Washington's insanity defense. Thomas testified about Washington's history of traumatic incidents and

injuries, including his withdrawal following the death of his father in 1975 and his brother's suicide in 1985, his vehicular accident in 1988 or 1989, facial trauma suffered in 1990 that caused swelling around the frontal face and black eyes, the killing of an acquaintance in 1991, and an injury over his eye requiring stitches in 1994. Washington told Thomas that he considered joining an organization known as the Masons, but that he changed his mind because the Masons asked him for personal information. Several years later he told Thomas that he had information about the Masons for which he could be killed. In early 2000, Thomas noticed that Washington started smoking marijuana, and about July 2003 became suspicious that he was using crack cocaine after observing a crack pipe and other items in his house. Washington became increasingly delusional about the Masons coming to get him. When Washington told Thomas about his activities on September 29, 2003, he told her he did not remember picking up a gun, but that he was trying to save his life.

Washington's friend, Baldwin, testified that he received information that Washington was involved in a vehicular accident in 1988 or 1989, that afterward Washington became forgetful, that a few years later Washington's friend was killed and he became withdrawn, and that about April 2003, Washington started talking about someone trying to kill him. Washington never talked to Baldwin about the Masons, but Baldwin observed that Washington acted strangely, that his hygiene deteriorated, and that when talking together, he would "just stare" at Baldwin.

Zmachinski interviewed Washington on June 11, 2004, and administered the Minnesota Multiphasic Personality Inventory (MMPI). Washington was rational and cooperative and reported that he once spoke to members of a Mason organization about joining that organization, but decided not to and became afraid that the Masons were after him. He told Zmachinski about the September 29, 2003, incident and his belief that the Masons were after him, but did not admit shooting a gun. He said that he began using crack cocaine, marijuana, and alcohol on a daily basis beginning about August 1, 2003, continuing until the time of his arrest. Zmachinski opined that Washington suffered from a mental illness and could not differentiate right and wrong. She indicated that drugs exacerbated his mental condition, but that she did not believe that his drug use was the source of his mental state at the time of the shooting because she had records indicating that Washington's mental state continued well after the shooting incident. She did not evaluate the source of the mental illness, and she could not predict if Washington would have committed the crime if he were not using cocaine or marijuana.

Eric Amberg interviewed Washington on July 25, 2004, administered a battery of tests, spoke to members of Washington's family, and reviewed various records and reports. Washington told Amberg that he was once hit in the head with a chair, was involved in a significant motor vehicle accident, that three of his close friends died or were killed, expressed a belief that the Masons were out to get him, indicated that he has auditory and visual hallucinations, and reported having considerable sleep deprivation before the September 29, 2003 incident. Amberg opined that Washington suffered from dementia, a deteriorating brain condition caused by head trauma, and that Washington was insane at the time of the incident because he was unable to appreciate his situation, was unable to cope, could not effectively use emotions in an integrated fashion, and had difficulty determining right from wrong. Although Amberg received information that Washington may have been exposed to drugs, he believed that the "insanity was created way before the use of drugs was involved" and that any effect from drug use was negligible. Amberg conceded that there was information in the records indicating

that Washington was admitted to Detroit Receiving Hospital after he was arrested, had an admitting diagnosis of agitated delirium caused by cocaine, tested positive for cocaine and marijuana during his hospital admission, and was treated for a cocaine overdose. Amberg did not, however, review records from Detroit Receiving Hospital when forming his opinion.

Charles Clark, a forensic psychologist with a specialty in clinical psychology, testified as the prosecutor's rebuttal witness. Clark interviewed Washington on August 25, 2004, reviewed reports and evaluations, and spoke with Washington's sister Sherry and his girlfriend. Clark administered a personality assessment inventory test as part of his psychological testing, but did not re-administer the MMPI because Washington took it twice previously and the results indicated that Washington willfully attempted to make himself look impaired. Washington told Clark that he had used marijuana regularly since the age of 17, but that his crack cocaine use did not begin until after a friend died in August 2003. He denied drinking or using marijuana or crack cocaine on September 29, 2003, but he claimed that he heard voices and was concerned about the Masons being after him. Clark opined that Washington was not mentally ill but that he was psychotic at the time of the September 29, 2003 incident because of cocaine use.

The jury found Washington guilty on all counts but, although Washington was charged with first-degree premeditated murder, the jury convicted him of the lesser offense of second-degree murder. The trial court sentenced Washington as an habitual offender, second offense, to concurrent terms of 40 to 60 years' imprisonment for the second-degree murder conviction, life imprisonment for each assault conviction, and 2 to 7-1/2 years' imprisonment for the felon in possession of a firearm conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction, with credit for 441 days served. Washington appealed as of right. This Court previously remanded this case to the trial court to allow Washington to move for a new trial on the ground that the jury's verdict was against the great weight of the evidence. On September 30, 2005, the trial court denied the motion.

## II. Motion For New Trial

### A. Standard Of Review

Washington seeks a new trial on the ground that trial counsel was ineffective for failing to move for a new trial. Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law.<sup>6</sup> In general, the defendant must show both deficient performance and prejudice.<sup>7</sup> "The remedy for deprivation of the Sixth Amendment right to counsel must be tailored to the injury suffered."<sup>8</sup> Accordingly, this Court's earlier remand order that allowed Washington to move for a new trial, through appellate counsel,

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<sup>6</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>7</sup> *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000).

<sup>8</sup> *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995).

remedied any prejudice in this regard.<sup>9</sup> Because Washington was afforded an opportunity to move for a new trial, any further appellate relief is not warranted with respect to this issue.

Washington additionally claims that the trial court erred in denying his motion for a new trial. Where a defendant claims that the verdict is against the great weight of the evidence, the test is “whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.”<sup>10</sup> Thus, the proper focus for the trial court’s decision is whether the trial evidence preponderates against the jury verdict, not whether the defendant satisfies a preponderance of the evidence standard when moving for new trial. We review the trial court’s decision whether to grant a new trial for an abuse of discretion.<sup>11</sup>

## B. Denial Of Motion

We are not persuaded that the trial court applied an incorrect standard in denying Washington’s motion for new trial. It is apparent that the trial court was cognizant of its discretion and properly focused on the trial evidence when denying Washington’s motion. The trial court was only called upon to evaluate the affirmative defense of legal insanity for which Washington had the burden of proof. MCL 768.21a(3) provides the sole standard for determining criminal responsibility as it relates to mental illness.<sup>12</sup> “An individual is legally insane if, as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.”<sup>13</sup> If a defendant is not legally insane, a jury may find that the defendant was mentally ill at the time of the offense, in which instance he must undergo an evaluation as provided in MCL 768.36.<sup>14</sup>

In this case, the jury rejected verdicts of both not guilty by reason of insanity and guilty but mentally ill. Thus, we need only focus on the “mental illness” element of Washington’s insanity defense in determining whether the trial court abused its discretion in denying Washington’s motion for a new trial. As defined in the Mental Health Code, “mental illness” means “a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”<sup>15</sup>

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<sup>9</sup> See *id.*

<sup>10</sup> *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003); *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

<sup>11</sup> MCR 6.431(B); *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

<sup>12</sup> *People v Carpenter*, 464 Mich 223, 239; 627 NW2d 276 (2001).

<sup>13</sup> MCL 768.21a(1).

<sup>14</sup> *Carpenter*, *supra* at 232.

<sup>15</sup> MCL 330.1400(g).

Where expert testimony is presented in support of an insanity defense, the probative value of the expert's opinion depends upon the facts on which it is based.<sup>16</sup> The purpose of expert testimony is to assist a jury to understand evidence or determine factual issues.<sup>17</sup> Further, a trial court must generally defer to a jury's determination, "[u]nless it can be said that directly contradictory testimony was so far impeached that 'it was deprived of all probative value or that the jury could not believe [the testimony],' or [the testimony] contradicted indisputable physical facts or defied physical realities . . . ."<sup>18</sup>

Examined in this context, the trial court gave appropriate consideration to the opinion and testimony of the prosecution's rebuttal expert witness, Charles Clark, in finding that the jury's verdict was not against the great weight of the evidence. The trial court recognized that Washington relied on expert testimony to establish his defense and that Clark's rebuttal testimony indicated that Washington was not mentally ill, but only suffered a psychotic episode triggered by drugs or alcohol, when determining that the jury reached a reasonable verdict.

Washington has not substantiated his position that Clark's testimony contradicted indisputable physical facts or defied physical realities. "An appellant may not merely announce [a] position and leave it to this Court to discover and rationalize the basis [of the] claim[]." <sup>19</sup> Further, while evidence that an expert was compensated for testifying is probative of the expert's credibility,<sup>20</sup> Washington has not established that Clark's testimony was rendered inherently incredible. Considering the evidence as a whole, Washington has not demonstrated that the trial court abused its discretion in denying his motion for a new trial.<sup>21</sup> The record does not present the type of exceptional circumstances warranting the removal of credibility issues from the jury.<sup>22</sup>

### III. Sequestration

#### A. Standard of Review

Washington argues that the trial court substantially prejudiced him from receiving a fair trial by allowing Clark to remain in the courtroom during part of the testimony of Cathie Zmachinski, one of the two experts called by Washington in support of his insanity defense. Because the trial court had discretion to allow Clark to remain in the courtroom during

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<sup>16</sup> *People v Dobben*, 440 Mich 679, 697; 488 NW2d 726 (1992).

<sup>17</sup> *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986); MRE 702.

<sup>18</sup> *Musser*, *supra* at 219, quoting *Lemmon*, *supra* at 645-646.

<sup>19</sup> *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

<sup>20</sup> *People v Chatfield*, 170 Mich App 831, 834-835; 428 NW2d 788 (1988).

<sup>21</sup> *Cress*, *supra* at 691; *Lemmon*, *supra* at 648.

<sup>22</sup> *Lemmon*, *supra* at 642-643.

Zmachinski's testimony,<sup>23</sup> we review for abuse of discretion.<sup>24</sup> In general, an abuse of discretion occurs when a trial court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."<sup>25</sup>

#### B. Expert Rebuttal Witness

One purpose of a sequestration order is to prevent witnesses from comparing the testimony that they are about to give at trial with the testimony of another.<sup>26</sup> Because Clark did not give factual testimony regarding the circumstances of the shooting, but rather an opinion to assist the jury to determine if Washington was legally insane, the trial court correctly observed that the reason for sequestration that seeks to prevent witnesses from molding factual testimony to conform to each other was not present in this case. Unlike the situation in *People v Cutler*,<sup>27</sup> where the trial court refused to sequester several prosecution witnesses, the instant case involved a single rebuttal witness on the issue of Washington's sanity. Rebuttal evidence is generally responsive to materials presented by the defense.<sup>28</sup> Although there was evidence that Zmachinski prepared a report summarizing her opinion and findings before trial, it was not unreasonable for the trial court to allow Clark to hear if Zmachinski offered any additional information at trial regarding the basis of her opinion that should be contradicted, repelled, or explained. Given the particular facts of this case, the trial court did not abuse its discretion in allowing Clark to be present during Zmachinski's testimony.<sup>29</sup>

#### IV. Rebuttal Argument

##### A. Standard Of Review

Washington argues that the prosecutor's rebuttal argument deprived him of a fair trial. Because Washington did not preserve this issue with an objection to the prosecutor's remarks at trial, our review is limited to plain error affecting Washington's substantial rights.<sup>30</sup> Whether the prosecutor's "psychological mumbo jumbo" remark in his closing argument was also improper is

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<sup>23</sup> *People v Martin*, 386 Mich 407, 424; 192 NW2d 215 (1971); *People v Jehnsen*, 183 Mich App 305, 309; 454 NW2d 250 (1990).

<sup>24</sup> *Martin*, *supra* at 424-425.

<sup>25</sup> *People v Yost*, 468 Mich 122, 127; 659 NW2d 604 (2003), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

<sup>26</sup> See *People v Stanley*, 71 Mich App 56, 62; 246 NW2d 418 (1976).

<sup>27</sup> *People v Cutler*, 73 Mich App 313; 251 NW2d 303 (1977).

<sup>28</sup> *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

<sup>29</sup> *Martin*, *supra* at 305; see also *Yost*, *supra* at 127.

<sup>30</sup> *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

a separate issue that is not properly before us because it is not set forth in the statement of issues, as required by MCR 7.212(C)(5).<sup>31</sup> However, we have chosen to address it as well.

### B. Improper Remarks

A prosecutor's remarks are examined in context.<sup>32</sup> Examined in context, it is apparent that the prosecutor's remark about "psychological mumbo jumbo" was intended to attack the weight or credibility of Zmachinski's opinion on the ground that she attempted to conceal part of her findings from the jury. The prosecutor's argument was supported by Zmachinski's testimony, on recross-examination, in which she admitted that she had earlier failed to read a portion of her findings with respect to the Minnesota Multiphasic Personality Inventory test. The prosecutor was free to argue from the evidence that Zmachinski was not credible.<sup>33</sup>

Washington's additional claims relate to prosecutor's rebuttal argument. It is clear from our review of the record that, as a whole, the prosecutor suggested that defense counsel was actually presenting multiple defenses and insanity theories, and that the evidence in support of any proposed defense theory was weak. The prosecutor was free to argue the weakness of evidence advanced by the defense.<sup>34</sup>

To the extent that some of the prosecutor's remarks could be considered improper, any prejudice was cured by the trial court's instructions that the jury was to decide the case based solely on the evidence, and that the lawyer's statements and arguments are not evidence.<sup>35</sup> Jurors are presumed to have followed their instructions.<sup>36</sup>

### V. Sentencing Guidelines

Washington seeks resentencing on the ground that the trial court failed to state substantial and compelling reasons for departing from the sentencing guidelines range. The prosecutor concedes on appeal, and we agree, that the trial court did not satisfy MCL 769.34(3) when imposing a sentence outside the prescribed sentencing guidelines range. Therefore, we vacate Washington's sentences and remand for resentencing. We note that, on remand, the trial court is only required to complete a sentencing information report for the highest crime class felony conviction, which in this case is the second-degree murder conviction.<sup>37</sup> We also note that, while the trial court purported to sentence Washington as a second-felony habitual offender, it failed to

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<sup>31</sup> See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

<sup>32</sup> *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354 (2004).

<sup>33</sup> *Id.* at 722.

<sup>34</sup> See *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003); *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

<sup>35</sup> *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004); *Schutte*, *supra* at 720-722.

<sup>36</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

<sup>37</sup> *People v Mack*, 265 Mich App 122, 127; 695 NW2d 342 (2005).



adjust the applicable guidelines range as provided by MCL 777.21(3)(a). Therefore, on remand, the trial court should determine the effect of Washington's habitual offense status on the guidelines range for the second-degree murder conviction pursuant to MCL 777.21(3)(a). If the trial court determines that a departure from the prescribed sentencing guidelines range is appropriate, it shall articulate substantial and compelling reasons for that departure consistent with MCL 769.34(3) and *People v Babcock*.<sup>38</sup>

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio

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<sup>38</sup> *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003); see also *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005); *People v Wideman*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2006 (Docket No. 257143).